

December 12, 1996

COMPLAINT 1996 - NO. 10
Caucus Internet Page

REASONABLE CAUSE DETERMINATION«ORDER OF DISMISSAL

I. Nature of the Complaint

The complaint alleges that the Senate Democratic Caucus, and specifically several members of the caucus who stood for reelection in 1996, violated the State Ethics Act by creating and publishing, at public expense, campaign material on the Internet at the Caucus' homepage during the election period of 1996. Specifically, the complaint alleges that Senators Harriet Spanel, Valoria Loveland, Betti Sheldon, Lorraine Wojahn, and Sid Snyder violated RCW 42.52.180, the Act's prohibition on the use of public facilities for campaign purposes.

II. Procedural History

Complaint 1996 - No. 10 was received on September 13, 1996. The complaint was transmitted to the Office of the Attorney General for staff assistance on the same date, September 13, 1996, pursuant to RCW 42.52.450, because it alleges a violation of RCW 42.52.180 by a legislator.

An investigation was conducted pursuant to RCW 42.52.420. The results were submitted to the Board in an investigative report on October 10, 1996. The Board requested further investigation, and supplemental information was submitted on November 14, 1996.

Senator Harriet Spanel, who is one of the members of this Board, did not participate in and was not present during this Board's deliberations on this complaint.

III. Determination of Allegations of Fact

In August, 1996, the Senate Democratic Caucus made the choice to publish— a homepage as a separate site on the Legislature's homepage on the Internet. The Senate Democratic homepage was activated shortly thereafter. None of the other three partisan caucuses in the Legislature chose to publish a homepage prior to the November, 1996 election.

The materials that are the subject of this complaint are titled, variously, Senate Democratic Leadership,– Building on Our Past Accomplishments,– Welcome Back to School,– Members of the Senate Democratic Caucus,– What Do You Think,– and various issue-related documents. The materials are similar to legislative newsletters: they contain photos of legislators, are widely available, survey readers on a particular topic, and discuss issues in somewhat partisan terms. The difference is that the homepage is sponsored by the entire caucus, not a single member, and is available electronically on the Internet, as opposed to by mail. None of the material directly advocates the election of any of the named Senators or of any other member of the Senate Democratic Caucus. Nor does it expressly advocate the election of Democrats to the Senate.

IV. Determination of Allegations of Ethics Law Violations

A. Relevant Statutes

RCW 42.52.180 prohibits the use of state resources for the purpose of assisting a campaign for election. For purposes of this complaint, the pertinent portions of RCW 42.52.180 provide as follows:

(1) No state officer or state employee may use or authorize the use of facilities of an agency, directly or indirectly, for the purpose of assisting a campaign for election of a person to an office or for the promotion of or opposition to a ballot proposition. Knowing acquiescence by a person with authority to direct, control, or influence the actions of the state officer or state employee using public resources in violation of this section constitutes a violation of this section. Facilities of an agency include, but are not limited to, use of stationery, postage, machines, and equipment, use of state employees of the agency during working hours, vehicles, office space, publications of the agency, and clientele lists of persons served by the agency.

In addition to the above restrictions, RCW 42.17.132 places certain restrictions on mailings by incumbent legislators during most of the last year of their term of office. A violation of this statute is deemed to be a violation of RCW 42.52.180. RCW 42.17.132 provides as follows:

During the twelve-month period preceding the last day for certification of the election results for a state legislator's election to office, the legislator may not mail to a constituent at public expense a letter, newsletter, brochure, or other piece of literature except as provided in this section.

The legislator may mail one mailing no later than thirty days after the start of a regular legislative session and one mailing no later than sixty

days after the end of a regular legislative session of identical newsletters to constituents.

The legislator may mail an individual letter to an individual constituent who (1) has contacted the legislator regarding the subject matter of the letter during the legislator's current term of office; or (2) holds a governmental office with jurisdiction over the subject matter of the letter.

A violation of this section constitutes use of the facilities of a public office for the purpose of assisting a campaign under RCW 42.52.180.

The house of representatives and senate shall specifically limit expenditures per member for the total cost of mailings, including but not limited to production costs, printing costs, and postage.

B. Analysis

1. Mailing Restrictions

The mailing restrictions found at RCW 42.17.132 prohibit legislators from mailing a "letter, newsletter, brochure, or other piece of literature" to constituents, except under the limited circumstances set forth therein. The term "newsletter" is not defined in the statute. The Board has previously used the ordinary meaning of the term. "Newsletter" is defined in Webster's New World Dictionary, College Edition, as a "report issued by a firm, governmental agency, etc. to keep employees or the public informed of pertinent matters." Webster's Third New International Dictionary defines the term to include "a printed sheet . . . containing news or information of current interest to or bearing upon the interests of a special group". Complaint Opinions 1996 Nos. 2 and 3.

The material on the caucus homepage is clearly analogous to a newsletter. However, it has not been mailed, either by means of regular mail or electronically through the use of electronic mail. **Therefore, the Board finds that the homepage does not fall within the specific language of RCW 42.17.132.**

2. Use of Public Facilities for Campaign Purposes

By the terms of the statute itself, a violation of the above mailing restrictions constitutes a violation of the prohibition on the use of public facilities for campaign purposes, RCW 42.52.180. Although the homepage in this case does not constitute a violation of the mailing restrictions, the mailing restrictions are not the exclusive method of violating the prohibition on assisting campaigns. The mailing restrictions can be applied by analogy to other types of publications to determine whether a violation of RCW 42.52.180 has occurred, even though the mailing restrictions technically have not been violated.

The text of the homepage contains partisan material describing caucus positions on a variety of subjects. We must determine whether placement of partisan material on the caucus homepage during an election season constitutes an indirect use of state resources by those members of the caucus who are up for reelection. The argument can be made that since this material is analogous to a newsletter, it cannot be made available after the last date for mailing newsletters, sixty days after the end of a legislative session.

It can also be argued that this material is analogous to a press release. During the election season, both the House and the Senate employ a strict procedure for the review of press releases and other widely distributed materials. This procedure requires that, between June 30th and the day of the general election, the Chief Clerk and the Secretary of the Senate must review all distributed materials. In addition to this procedure, the Board has adopted several factors to be applied in determining whether a particular press release violates RCW 42.52.180. In Advisory Opinion 1996 - No. 11, the Board identified the following factors: timeliness, proximity to an election, relevance, the source of the initial statement (for purposes of a responsive release), and tone and tenor.

The factors that are most pertinent to this complaint are timing and proximity to an election. As noted above, the homepage material was available throughout the entire campaign season, up to and continuing through the date of the election.

It should be noted that the extent and nature of Internet usage, as well as the usage of other electronic communication mediums, were unknown at the time the Legislature adopted the State Ethics Act and the people adopted Initiative 134. The Board therefore determines that the use of the Internet generally, and homepages in particular, do not fit easily within the terms of the statute. In order to proceed on the complaint, the Board must find that there is "reasonable cause to believe that a violation of this chapter or rules adopted under it has been or is being committed" (RCW 42.52.420). As stated earlier, the use of Internet homepage is not clearly addressed by the statute. We have also not adopted any rules or issued any advisory opinions on the subject of Internet usage. The Board believes that it should be cautious when applying the statute to a situation not previously addressed, especially when it is being extended to a new form of technology. We should not retroactively apply limitations that are better set forth first in advisory opinions. In so saying, we do not wish to imply that we condone the Senate Democratic Caucus' judgment in treading into a new area without first seeking advice from this Board. They should have exercised appropriate caution since they have a special obligation to the citizens of the state to follow the spirit of the law as well as its express language. **We will not retroactively apply limitations that are better set forth first in advisory opinions. Therefore, we do not find reasonable cause to find a violation under the facts of this case.**

3. Prospective Application (Advisory Opinion)

In Advisory Opinion 1995 - No. 19, we described the purpose of the mailing restrictions

as follows:

The purpose of RCW 42.17.132 is to reduce the advantage in elections that incumbent legislators previously enjoyed through mailings at public expense during the last year of their terms. This purpose is generally accomplished by limiting the number and kind of mailings that legislators may mail during that year.

We reiterate this purpose and apply it equally to other means of communicating with constituents at public expense during an election season. It substantiates our intent to apply by analogy the mailing restrictions of RCW 42.17.132 in future cases involving the publication and distribution of partisan or campaign-related materials by electronic means, as well as by mail, where we must determine whether such publication and distribution constitutes a violation of the prohibition on the use of public facilities for campaign purposes. This legislative purpose also substantiates our intent to apply the factors found in Advisory Opinion 1996 - No. 11 to all materials published and distributed for public consumption, including those published and distributed by electronic means, and not just to responsive press releases.

V. Conclusion and Order

Based on a review of the complaint and the Board's investigation, the Board determines that there is not reasonable cause to believe that Senators Harriet Spanel, Valoria Loveland, Betti Sheldon, Lorraine Wojahn, Sid Snyder or the Senate Democratic Caucus violated RCW 42.52.180. The complaint is, therefore, dismissed.

Although we intend to do so without any changes, we encourage the Legislature to enact rules and/or statutory changes to clarify the application of the statute to electronically published and distributed materials.

William Asbury, Chair